No. 7771

In the

# United States Circuit Court of Appeals

For the Ninth Circuit

---

THE NORTHERN PACIFIC TERMINAL COMPANY,
a corporation

*Appellant*

*v.*

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY,
a corporation

*Appellee*

---

Upon Appeal from the United States District Court
for the District of Oregon.

---

## BRIEF OF APPELLEE

---

CHARLES A. HART,
*Attorney for Appellee.*

CAREY, HART, SPENCER & MCCULLOCH,
*Of Counsel.*

## SUBJECT INDEX


*Page*

Statement of the Case ..... 1

Argument ..... 4

Restrictions Upon Right of Common Carrier Consignee to Share in Tariff Charges ..... 5

Terminal Company's Shipments not Consigned Through to a Destination on its Line ..... 9

Delivery of Shipments Accepted by Terminal Company as Consignee and not as Connecting Carrier. 17

Railway Company's Position in 1926 the Same as that Taken in this Litigation ..... 29


## AUTHORITIES CITED


*Page*

Baltimore & Ohio Southwestern Railroad Co. v. Settle, 260 U. S. 166 ..... 10-11

In the Matter of Restricted Rates, 20 I. C. C. 426.. 8- 9

Tuckerton Railroad Co. v. Pennsylvania Railroad Co., 52 I. C. C. 319 ..... 9

No. 7771

**In the**

# United States Circuit Court of Appeals

**For the Ninth Circuit**

---

THE NORTHERN PACIFIC TERMINAL COMPANY,
a corporation

*Appellant*

*v.*

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY,
a corporation

*Appellee*

---

Upon Appeal from the United States District Court for the District of Oregon.

---

## BRIEF OF APPELLEE

---

### STATEMENT OF THE CASE

Appellant, The Northern Pacific Terminal Company (to which we shall refer as the "Terminal Company"), was the consignee of a considerable number of oil shipments which moved over the railroad

of appellee, Spokane, Portland and Seattle Railway Company (to which we shall refer as the "Railway Company"). The Terminal Company is also a common carrier by railroad, with several miles of railroad trackage within the City of Portland. The oil shipments in question were delivered by the Railway Company to the Terminal Company at a point where their respective tracks connect, and the Terminal Company then hauled the shipments to the spur track at which the cars were unloaded.

The question in dispute involves this latter haul; the Railway Company contends that it delivered the shipments to the Terminal Company *as consignee,* and that the further transportation on the rails of the Terminal Company was nothing more than an intra-plant movement by the consignee; the contention of the Terminal Company is that (although it was the consignee of the shipments) the cars were accepted from the Railway Company for further common carrier transportation to the particular point of unloading. Upon this theory the Terminal Company claims the right to share, as a participating common carrier, in the tariff charges collected from it as consignee.

The entire transportation was within the corporate limits of the City of Portland. It was governed by so-called switching tariffs which imposed a flat rate per car from one zone in the city to another. The point of connection between the tracks of the two companies (at which the Terminal Company took possession of the cars) was in the same zone as the point at which the Terminal Company unloaded the cars. Hence no greater tariff charge would have been collectible if the movement to the point of unloading were considered a part of the common carrier service. Under an agreement made pursuant to the tariffs, carriers participating in an inter-zone haul were entitled to divide the tariff charges equally. Therefore, the Terminal Company's contention in result means that the Railway Company was required to pay back to the Terminal Company one-half of the tariff charges for the transportation service rendered.

The trial court rejected the Terminal Company's contention. No written opinion was filed, but there was a finding that the Terminal Company "was not a participating carrier and is not entitled under the applicable tariffs to a share in or a

division of the tariff charge covering said transportation service; . . ." The Railway Company (plaintiff in the court below), having theretofore paid the Terminal Company in the mistaken belief that the charges collected were subject to division, was given judgment for the amount thus erroneously paid.

## ARGUMENT

Appellant's argument is addressed to the final conclusion of the trial court that the Terminal Company did not sustain the relation of participating common carrier to the oil shipments of which it was consignee. The assignments of error filed in the lower court, and the specification of errors in appellant's brief, raise other questions not going to the merits. Except for the question of estoppel (Specification of Error V) these are not argued separately. The brief explains that the record in the lower court was made "with a view to presenting and preserving the fundamental question . . ." (Appellant's Brief, pp. 12-c, 12-d).

Specifications of Error II, III and IV challenge the refusal of the court to make rulings on particular questions of law. (Appellant's Brief, pp.

12-a, 12-b, 12-c. Since no argument is made in support of these specifications, we shall assume they have been waived. This leaves for discussion the question whether the evidence is sufficient as a matter of law to sustain the findings and conclusions upon the merits, and the question of estoppel presented by Specification V.

Appellant advances three "Propositions of Law". The first two go to the merits; the third refers to the estoppel claimed. Shortly stated, the contention (upon the merits) is that the shipments were intended to go to a point on the Terminal Company's railroad beyond the junction with the Railway Company's line, and that this required common carrier service by the Terminal Company. The question is one of mixed law and fact dependent for its answer upon the particular facts involved; as appellant points out (Appellant's Brief, p. 14), the general principles stated in the "Propositions of Law" are not open to question.

**The Right of a Common Carrier to Share in Tariff Charges Paid by it as Consignee is of Necessity Narrowly Restricted.**

Before discussing the facts, it may serve a useful purpose to point out the limitations which are

necessarily attached to the right sought to be exercised by the Terminal Company. Undoubtedly a common carrier has an option with respect to shipments of which it is the consignee and which are intended to be moved to a destination beyond the point where the shipments are received from the connecting line. It may take delivery as consignee at the junction with the connecting line, or it may provide for common carrier transportation over its own line as well, to the point of final destination. The advantage may be one way or the other; the through rate to the final destination may be substantially greater than the rate to the junction point, and the division or share of the rate which would come to the consignee as a participating carrier may not be large enough to offset this difference, in which case the consignee carrier would be better off to take delivery as consignee at the junction point; or, on the other hand, the rate to the final destination may not be much in excess of that applicable to the junction point, in which case the right to share as a connecting carrier in the through rate may make it more advantageous to defer taking delivery as consignee until the shipment reaches its final destination. The follow-

ing illustration will make this clear:

The Southern Pacific operates a line of railroad from San Francisco to Ogden, where it connects with the Union Pacific. In making purchases of material at Chicago for use at San Francisco, the Southern Pacific has the option to have the shipments billed through from Chicago to San Francisco at the through rate applicable to such a movement, the Southern Pacific taking a share or "division" of the tariff charges fixed by agreement between the two lines; or, if there is a substantial difference between the Chicago-Ogden rate and the Chicago-San Francisco rate, not offset by the division or share which would go to the Southern Pacific, it could have the shipments billed to itself at Ogden, taking delivery as consignee there. If this were done, only the tariff charge from Chicago to Ogden would be collected, the shipments being transported from Ogden to San Francisco as company material not subject to any tariff charge.

It became obvious, however, quite early in the history of railroad rate regulation, that this option provided a comparatively simple means of evading tariff provisions. Shipments intended for use at or near the junction with the connecting carrier, and

which were not to be moved at all on the rails of the consignee carrier, were given a fictitious destination beyond the junction point, and the through rate applied, the consignee carrier being given the share of that rate fixed by the prevailing division agreement. This in effect was nothing less than a rebate of part of the charges paid for transportation from the point of origin to the point at which the shipments reached the line of the consignee carrier.

To meet this situation the Interstate Commerce Commission in 1908 adopted the following ruling (italics ours):

> "A carrier, or a person or corporation operating a railroad or other transportation line, may not, as a shipper over the lines of another carrier, be given any preference in the application of tariff rates on interstate shipments, but it may lawfully and properly take advantage of legal tariff joint rates applying to a convenient junction or other point on its own line, *provided such shipments are consigned through to such point from point of origin and are, in good faith, sent to such billed destination.*"

This conference ruling was adhered to by the Commission when challenged in formal proceedings. *In the Matter of Restricted Rates,* 20 I. C. C.

426, *Tuckerton Railroad Co. v. Pennsylvania Railroad Co.*, 52 I. C. C. 319.

The limitation imposed by this ruling is that a carrier consignee can receive back a part of the tariff charges paid, only when it actually participates in the common carrier transportation service provided; and this means that the consignee carrier does not function as a participating common carrier with respect to the haul on its own line to the point of final destination, unless the shipments "are consigned through to such point from point of origin and are in good faith sent to such billed destination."

**The Terminal Company's Shipments were not Consigned Through to a Destination on its Line Beyond the Point at Which the Shipments were Received from the Railway Company.**

All of the shipments involved in this action were billed to the Terminal Company at "Guild's Lake"; and it is not disputed that the Terminal Company's properties at Guild's Lake included the trackage upon which cars were placed by the Railway Company when delivery to the Terminal Company was intended. The bills of lading, which stated the contract for common carrier transpor-

tation service between the Terminal Company's shipper and the Railway Company, provided for the movement of the cars from Willbridge or Linnton (the shipping points) to Guild's Lake, at which place delivery was to be made to the Terminal Company.

It would seem quite clear that shipments thus billed were not consigned through to a point on the Terminal Company's line so that common carrier transportation on the railway of the Terminal Company can be said to have been intended and contracted for. All of the transportation service called for by the bills of lading was provided by the Railway Company when it placed the cars in the possession of the Terminal Company upon the interchange tracks at Guild's Lake.

The Terminal Company's chief contention seems to be that the shipments when made were intended to go to the fuel oil spur of the Terminal Company and were not to stop at the interchange track. It is said that this determined the "essential character" of the shipments, and that this governs, irrespective of the billing, under the rule applied by the Supreme Court in distinguishing between interstate and intrastate transportion. See *Balti-*

*more & Ohio Southwestern Railroad Co. v. Settle,* 260 U. S. 166.

This argument overlooks the fact that the shipments were consigned to a common carrier which had the right to take delivery either at the point of interchange with the common carrier, or at the final destination on its own line. The fact that the oil was purchased for delivery at the oil spur of the Terminal Company, whether known to the Railway Company or not, is of itself of no significance. The intention to have the cars go to this final destination indicated nothing as to the character of the transportation service to be accorded the shipments after they came into the possession of the Terminal Company. When the shipments were made, *but not thereafter,* the Terminal Company had a choice as to this; it could have directed its shipper to designate as the destination of the common carrier transportation, either the place at which the cars would reach the rails of the Terminal Company, or the point on those rails to which the cars were ultimately to go.

The choice of the first alternative meant an intraplant movement or company material haul, on the Terminal Company's line, from the point of

interchange to the fuel oil spur; the other meant common carrier transportation through to the oil spur. In either case the cars would be hauled by rail to the Terminal Company's oil spur, in accordance with the asserted intention that the oil was purchased for delivery at the oil spur.

The option of the Terminal Company was exercised when its shipper consigned the cars to the Terminal Company at Guild's Lake, without providing for any common carrier transportation service to some point on the line of the Terminal Company. This fixed the "essential character" of the transportation service, so far as the movement on the Terminal Company's railroad was concerned. Common carrier service beyond the junction point was not intended or provided for.

The decisions of the Commission to which we have referred leave no room for doubt that a carrier consignee must provide in advance for consignment of its shipments to some point on its own line beyond the point of interchange with the connecting carrier if it is to share in the tariff charges paid. The reason for this is obvious. Without this restriction, and with no obligation to supply any common carrier service beyond the point

of interchange, the shipments could be disposed of in any way desired (perhaps with no transportation service at all on the tracks of the consignee), and the consignee left free to claim a division of the tariff charges paid.

Here the bills of lading imposed no obligation upon the Terminal Company to provide any common carrier service whatsoever, after the cars came into its possession at the Guild's Lake interchange track. It was free to move the cars about its plant as might be desired. But any such movement, whether to the fuel oil spur or elsewhere, would be an intraplant or company material haul, not subject to published tariffs and not a part of the common carrier service called for by the bills of lading.

We understand appellant to contend also that in any event the oil shipments were in effect consigned through to the fuel oil spur at which the cars were unloaded. In support of this contention, appellant argues, (1) that since the fuel oil spur is located within the Guild's Lake yard of the Terminal Company, the designation of Guild's Lake as the place of delivery was sufficient to

require common carrier transportation to any location within the yard, and (2) that there were no unloading facilities at the interchange track, hence a consignment to "Guild's Lake" meant transportation to some point of unloading therein.

(1) Appellant's argument here is that the consignment of a shipment to an industry which has a spur track, need not specify the particular spur track location in the bill of lading. A shipment billed to such an industry at Portland or San Francisco, with no more specific designation of the place of delivery, would be entitled to transportation to the delivery or unloading track of the consignee.

This argument ignores the distinction between the ordinary commercial shipment and one made to a common carrier as consignee owning or operating trackage over which the shipment is to move. There are industries located on spur or side tracks of the Terminal Company in the Guild's Lake district; shipments billed to them at "Guild's Lake" obviously are entitled to common carrier transportation by the Terminal Company (from the interchange track to the place of delivery) without any designation in the bill of lading of the particular point of unloading. Here the shipments

were billed to a common carrier which had the right to take delivery *as consignee* at the point of interchange with the connecting carrier. This right would normally be exercised, because some saving in freight charges would result. But there are instances, such as that here involved, where the saving is the other way. By continuing the common carrier service to the final destination a very substantial share of the tariff charges could be gotten back. To make this possible, however, consignment through to some delivery point on the line of the consignee is essential, as is made clear by the decisions of the Commission cited. This was not accomplished by bills of lading which designated no such delivery point, but which permitted the consignee to take delivery at once when the shipments reached its rails.

It should be noted, too, that the transportation service here involved although referred to as switching service, is not the same as the switching service incident to the delivery of a shipment coming from a point outside of the city where a so-called line haul is involved. The transportation of the Terminal Company's oil cars under the switching tariff, Exhibit 2, was the equivalent of

drayage service; that is, it involved the movement of commodities from one point in the city to another. Under the provisions of the tariff, shippers applied for and procured the transportation of carload shipments from a point in one zone either to another point in the same zone or to a point in another zone, all within Portland terminals. The same industry may have warehouses or plants in different zones or at different locations in the same zone; the tariff, Exhibit 2, has a list of industries in different zones with the locations of their several delivery tracks specified. It would ordinarily be necessary, therefore, to have the bills of lading covering switching service of this kind specify the precise point of delivery.

The absence of any such designation in the bills of lading here involved was therefore significant; the billing plainly indicated that the Terminal Company was to take possession of the shipments as consignee when the shipments were turned over to it by the Railway Company at "Guild's Lake," the destination named in the bills of lading.

(2) The argument that because there were no unloading facilities at the interchange track fur-

ther transportation service on the line of the Terminal Company was intended, similarly ignores the considerations upon which the right of a carrier consignee to share in the tariff charges is based. Of course, further movement of the oil cars from the interchange track to the point of unloading was intended, but the question here involved turns upon the character of that transportation service, whether common carrier service or deadhead company haul.

The Terminal Company was entitled to take possession of the oil cars as consignee when the cars were delivered to it by the Railway Company at the interchange track, wherever it proposed thereafter to unload the cars. Bills of lading covering the shipments in question provided for such delivery; in the circumstances the lack of unloading facilities at the interchange track does not touch the question of delivery to the Terminal Company as consignee.

**Delivery of the Shipments by the Railway Company to the Terminal Company as Consignee and not as Connecting Carrier was Acquiesced in by the Terminal Company for Approximately Seven Years.**

There were no formalities attendant upon the transfer of possession of the shipments of fuel oil

involved, from the Railway Company to the Terminal Company, by which it could be determined at once whether or not the Terminal Company received the cars in its capacity as consignee. The method of transfer would have been the same, whether additional common carrier service was contemplated, or whether the cars were to be thereafter moved as company material.

But from the beginning of this transportation service in 1923 to the end of 1929, when the point of shipment was changed from Willbridge to Linnton, the Railway Company consistently treated the shipments as delivered to the consignee when they were placed on the interchange track at Guild's Lake. The Terminal Company acquiesced in this and no division or share of the tariff charges was turned back to the Terminal Company. All question as to this had apparently been definitely settled when, in early 1930, after the Linnton-Guild's Lake transportation had started, a series of misunderstandings led to the allowance of divisions on shipments moving in the ensuing two years. But for this error it is safe to say that the Terminal Company would have continued its acceptance of the shipments as consignee, and the question

here presented would never have arisen.

The oil shipments involved began in 1923 and continued to 1932. The demand for a share in the tariff charges was first made in 1926, when the comptroller of the Terminal Company wrote to the local agent of the Railway Company as follows (Transcript, pp. 60-61):

> "Upon investigation of cars delivered by S. P. & S. Ry. to Nor. Pac. Terminal Company of fuel oil, billed to N. P. T. Co., we find all the revenue is absorbed by the S. P. & S. Ry. We think this practice is wrong as under the switching tariff the Nor. Pac. Terminal Co. should get 50% of this revenue.
>
> . . . . . .
>
> "It is manifestly evident that the Terminal Company performs a part of the switching after receiving the cars from you, also in delivering the empty cars back to your yard. Under the arrangement of the zone switching tariff, we are entitled to 50% of the revenue where two companies participate in the switching."

The Railway Company answered, refusing to comply with this demand, explaining that to comply "would be nothing more or less than a modified form of rebating." (Transcript, p. 62.)

This explanation was accepted by the Terminal Company and no further claim was made that the Terminal Company was a participating common

carrier in the movement of this fuel oil in the ensuing three years. The Terminal Company's witness explains this inaction as follows (Transcript, pp. 102-103):

> "My predecessor was E. L. Brown, who was the comptroller of the Terminal Company for about fifty years. I do not blame Mr. Brown, but rather myself, as handling this matter rather poorly because I was in active charge of the accounting at the time. Up until 1926 we rather passed the explanation of Mr. Pickard with regard to the division of the switching revenue. The S. P. & S. having declined our demand of 1926 we did nothing about it until 1930. The movement continued from Willbridge right through until 1930 and we continued to accept the accounting of the S. P. & S. in the meantime."

This acquiescence for so many years in the Railway Company's decision that, as the shipments were consigned, the Terminal Company took possession of them at the interchange track as consignee and not for the purpose of further common carrier transportation, makes impossible the contention urged by the Terminal Company here. Specific advice was given by the Railway Company in 1926 that it considered the common carrier transportation ended at the interchange track. The Terminal Company could thereupon have directed

its shipper to consign the fuel oil to a particular point on the tracks of the Terminal Company, beyond the interchange track, in order to make the Terminal Company a participating carrier. This was not done; the Terminal Company did not bring itself within the rulings of the Interstate Commerce Commission, either as to the shipments subsequent to 1926 or as to those before. It is too late now to say that without through consignment to a point beyond the interchange track the Terminal Company took possession of the shipments in its capacity as common carrier and not as consignee.

The subsequent allowance to the Terminal Company from 1930 to 1932 of a division of the tariff charges on shipments from Linnton to Guild's Lake (which allowance the Railway Company is seeking to recover from the Terminal Company herein), came about in the following way:

When the movement from Linnton began, the agent at that point mistakenly assumed that the place of delivery was in zone 1 instead of zone 5. This meant an inter-zone haul partly on the tracks of the Terminal Company. The shipments were

billed accordingly, the rate applied being $11.50 per car (instead of the intra-zone rate of $8.55 per car), and the Terminal Company was permitted to share in the revenue as a participating common carrier. (Transcript, pp. 98-100.) On March 20, 1930, the comptroller of the Terminal Company wrote to the Railway Company's agent at Linnton calling attention to his error. The letter said (Transcript, p. 98):

> ". . . The N. P. Terminal Co. plant, where this fuel oil is unloaded, is located at Guilds Lake Yard in Zone 5 and the rate of $8.55, applicable to an exclusive zone 5 switch movement should be charged, with an equal division of the revenue between the N. P. T. Co. and the S. P. & S. Ry. Co."

The comptroller of the Railway Company answered this letter admitting that the rate applicable was $8.55 per car and not $11.50 per car. As to the claim for a share in the revenue, the following statement was made (Transcript, p. 99):

> "It is our understanding that these shipments are billed to connection with your line at Guild's Lake and should be handled on S. P. & S. local switching settlement statements, your line not participating in the haul."

The Terminal Company's comptroller answered on April 1, 1930, asserting that his Company par-

ticipated in the transportation covered by the tariff (Transcript, pp. 100-101), whereupon the comptroller of the Railway Company wrote the Terminal Company as follows (Transcript, p. 102):

> "If delivery of oil shipments to connections with your track does not complete the movement and the movement from such connections to unloading points involves an additional haul by the Northern Pacific Terminal Company, you will be entitled to 50% of the switching charge."

From this time on (April 18, 1930), the Railway Company accounted to the Terminal Company for one-half of the charges collected on these Linnton-Guild's Lake shipments. Two years later the Terminal Company made a demand for repayment of one-half of the charges collected on shipments which had been made from Willbridge prior to the year 1930. (Defendant's Exhibit E. Transcript, pp. 71-72.) The accounting department of the Railway Company agreed that an adjustment was due, but took the position that under limitations imposed by rules of the Railroad Accounting Officers Association the adjustment could not go farther back than April 1, 1929. The Railway Company thereupon paid over to the Terminal Company one-half of the charges collected on shipments from Will-

bridge between April 1, 1929, and December 31, 1929. (Transcript, pp. 73-76.)

This reversal by the accounting department of the Railway Company of the position taken in 1926, and acquiesced in by the Terminal Company until 1930, mistakenly assumed that the shipments were given common carrier transportation between the point of interchange and the point of unloading on the spur track of the Terminal Company. (Transcript, pp. 69, 101, 102.) Upon this assumption the accounting department of the Railway Company applied a ruling made some time before by counsel for the Railway Company upon a demand of the Portland Electric Power Company (also a common carrier by rail) to share in tariff charges where shipments had been billed to a point on the line of that company *beyond the point of connection at which possession of the shipments was taken.* The following quotation from the opinion of the Railway Company's counsel shows that it was based specifically upon the fact that the shipments to which it referred were billed to a destination upon the line of the Power Company beyond the point of interchange with the connecting line (Transcript, pp. 79-80) :

> "Ordinarily it is to the interest of a carrier which is also the consignee of a shipment, to fix the first junction point with the connecting carrier as the bill of lading destination so as to avoid the imposition of commercial freight rates for the full haul. In this case the advantage is the other way but we see no way of compelling the Portland Company to bill the shipment to the point of connection instead of its actual destination."

In March, 1933, the accounting department of the Railway Company discovered its error. Bills were thereupon rendered the Terminal Company for all of the division allowances theretofore made. (Transcript, p. 70.) Upon the refusal of the Terminal Company to pay these bills, this action was brought.

It is impossible to harmonize the acquiescence of the Terminal Company from 1923 to 1930 in the Railway Company's interpretation of the bills of lading covering the Willbridge-Guild's Lake shipments, with the renewal in March, 1930, of the contention that the movement of the oil cars from the interchange track to the unloading spur was part of the common carrier transportation service contracted for. Apparently the Terminal Company's comptroller thought he saw an opportunity to revive the claim in the error of the Railway

Company's agent at Linnton, when shipments from that point began. His letter (Transcript, p. 98) made no reference to the Railway Company's disposition of the question when he raised it in 1926. He merely called attention to the error in the rate, and added that his Company was entitled to "an equal division of the revenue," and the comptroller of the Railway Company, apparently ignorant of the fact that the General Freight Agent of his Company had refused a similar demand in 1926, answered that if an additional haul on the Terminal Company tracks was involved, the contract provision for an equal division of the charges would be applicable.

What these two Companies did in respect of the division of the tariff charges covering the oil shipments in question, is, of course, not controlling. If the Terminal Company in fact participated in the common carrier transportation service provided, it is entitled to a share in the revenue. If not, any division or refund of part of the charges collected would be an unlawful rebate. The practical construction given the bills of lading, and of the common carrier obligation assumed thereunder, is of importance, however, in determining the ques-

tion of fact involved, that is, whether the Terminal Company hauled the cars of oil, from the interchange track to its oil spur, as freight in its possession as a common carrier, or as company-owned material being moved from one point to another in its yard.

For seven years the parties were in agreement as to this. The question had been raised by the Terminal Company and the contention advanced that it was entitled to share in the tariff charges paid. The Railway Company answered that the Terminal Company was not a participant in the common carrier transportation covered by the tariff, and the Terminal Company accepted the answer. With the disputed issue clearly understood, the parties came to an agreement as to its disposition.

The events subsequent to this seven-year period form a decided contrast. In 1930 the Railway Company began allowing the divisions as to shipments from Linnton, because of an error on the part of the local agent. When this error was corrected the divisions were continued upon the assurance to the Railway Company's comptroller that through service to the unloading point was still involved.

In 1932 the Terminal Company applied for and received, upon the same assurance, a payment of divisions covering 1929 shipments (from Willbridge) within the limitation period thought applicable. In 1933 the Railway Company discovered its error and demanded the return of all divisions paid.

The Railway Company allowed these divisions for a time through a misapprehension of the facts. The Terminal Company, on the other hand, acquiesced in the refusal to pay them, during the earlier seven-year period, after a specific statement that the transportation service called for by the bills of lading ended when the shipments were delivered to the Terminal Company, the consignee, at the interchange track. Appellee submits that the practical construction given the rights and obligations of the two Companies during the ten years in which these shipments moved, confirms the conclusion adopted by the trial court; the Terminal Company took delivery of the shipments as consignee at the interchange track, and moved them from one point to another in its yard as company material. There was no participation in the common carrier transportation service covered by the

tariff, and the Railway Company could not lawfully repay to the Terminal Company any part of the tariff charges collected.

**The Railway Company's Position in this Litigation in no Sense Differs from that Stated in the Rejection of the Terminal Company's Demand in 1926.**

Appellant's claim of estoppel is that the demand for a share of the tariff charges was rejected in 1926 because its allowance would have been a form of rebating, whereas the Railway Company's demand in this litigation, for the return of the divisions paid, is based upon the "claimed insufficiency of the bill of lading." (Appellant's Brief, p 45.)

Neither statement of the positions taken by the Railway Company is accurate or complete. The Terminal Company was told in 1926 that the fuel oil cars were delivered to the consignee when they were placed on the interchange track and that for this reason any division of the tariff charges would be a rebate. The complete statement of the General Freight Agent of the Railway Company is as follows (Transcript, pp. 61-62):

> "Inasmuch as these cars are consigned to the Terminal Company, in so far as the SP&S is concerned, when they are set by us on the

> interchange with your line we are no longer interested in what is done with them. Delivery has been made to the Terminal Company at the nearest point and to give you a refund through the subterfuge of permitting you to participate in the division by reason of your switching it from the interchange over to the roundhouse, it seems to me would be nothing more or less than a modified form of rebating, in view of the oft expressed opinion of the Interstate Commerce Commission that a carrier performing service for another carrier, as we are doing for you in this instance, must make the same charge against such other carrier as they would contemporaneously make against any other shipper or consignee."

The position taken by the Railway Company in this litigation is exactly the same. Return of the divisions heretofore paid is demanded because the Terminal Company took possession of the shipments at the interchange track as consignee, and the movement of the cars in its Guild's Lake yard was not a part of the common carrier transportation service for which the tariff charge was imposed. For this reason an allowance to the Terminal Company of a part of the charges collected would be an unlawful rebate.

It is true that this results from the manner in which the shipments were billed, and that under the ruling and the decisions of the Interstate Com-

merce Commission, the Terminal Company could have been considered a participating common carrier if the shipments had been billed to a delivery point on its line beyond the connection with the line of the Railway Company. But this does not mean, and the Railway Company does not here contend, that there was anything "wrong" (Appellant's Brief, p. 34) about the billing. The Terminal Company, or its consignor, had the option to direct the delivery of the oil cars at the interchange track or at a point beyond on the line of the Terminal Company; the former alternative was selected. Had the rate advantage been the other way, no doubt the Terminal Company would insist that this manner of billing was deliberately chosen, in order to make sure that the movement on its own line would not be subject to any tariff charge. Whether intended or not, the billing of shipments here involved called for delivery to the consignee at Guild's Lake where the tracks of the Railway Company and the Terminal Company connected, and did not call for any common carrier transportation beyond the connection. Hence, any allowance to the Terminal Company out of the tariff charges collected would in effect be a rebate. This

was the position of the Railway Company in 1926, and it is the position of the Railway Company in this litigation.

What has been said answers appellant's contention, frequently appearing in its brief (pp. 35, 36, 37, 38, 47), that the Railway Company is responsible if the bills of lading were not correctly prepared. As we have pointed out, there was nothing incorrect or insufficient in the designation of Guild's Lake as the destination of the shipments. Appellant persistently ignores the difference between shipments consigned to a common carrier (delivery of which may be taken at the interchange with the connecting line) and the ordinary commercial shipments which necessarily receive common carrier transportation to their final destination, and as to which the designation of a particular delivery or unloading point might be needed.

No such direction was necessary in the case of shipments consigned to the Terminal Company *unless* common carrier service upon the line of the Terminal Company was desired. The specification of "Guild's Lake" was sufficient since the consignee had its own railroad line and could take delivery where the tracks of the two Companies connected.

The Terminal Company can hardly deny that the manner of billing these shipments was within its control. Necessarily the Railway Company looked to the shipper for instructions as to the designation of the shipments, and the shipper necessarily obtained its information with respect to the delivery point desired, from the consignee, the Terminal Company. As far back as 1926 the Terminal Company had been advised specifically that shipments billed to it at Guild's Lake were not entitled to common carrier transportation beyond the interchange track at that place. If the Terminal Company wanted this changed, it could readily have instructed its consignor to bill the shipments through to the specific point of unloading upon its own line. This was not done; the Terminal Company did not take advantage of its right to participate in the common carrier transportation covered by the tariff and it cannot lawfully share in the tariff charges paid.

Appellee submits that the trial court's findings of fact and conclusions of law are correct and that the judgment in favor of appellee should be affirmed.

CHARLES A. HART,
*Attorney for Appellee.*

CAREY, HART, SPENCER & MCCULLOCH,
*Of Counsel.*